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AFIA Newsletter

Robert Kovacs (Deputy Secretary)
University of Geneva

Since our last edition of *AFIA News*, AFIA has seen significant changes in terms of members, the composition of the Executive Committee and the reach of our activities.

Our membership base has steadily grown to over 300 members spanning over 22 countries. We have had a busy 2009, with 4 Symposia so far. In March this year AFIA held its first joint symposium with the International Chamber of Commerce Young Arbitrators' Forum (ICC YAF) in Hong Kong and in June, we held our first symposium in South Korea with a presentation by Mr Yu Jianlong, Vice Chairman (Secretary General) of CIETAC. We have also held Symposia in Melbourne (May) and Sydney (August).

In January, AFIA made a submission to the Attorney-General's Department on the Review of the International Arbitration Act 1974 (Cth). A copy of this submission is below.

In March AFIA participated in the first Co-Chair's Circle retreat which was held in Frankfurt. This Co-Chair's Circle is intended to allow various "younger" arbitration groups to get to know each other informally and to explore opportunities for interaction and cooperation.

As for what lies ahead, we can expect more exciting things to come! AFIA will be participating in the soon to be launched ICC YAF Asia eForum and will also be establishing an essay competition in conjunction with the Singapore International Arbitration Centre.

Details of these events will be circulated to members and you will also be able to find information on AFIA on our website at www.afia.net.au.

Inside This Issue

Recognition and Enforcement of Foreign Arbitral Awards in Taiwan

Nathan Kaiser
L.C. Hsu & Indy Liu, www.eigerlaw.com

The change of government in Taiwan in 2007 has lead to an opening in relations with China that was unexpected in its speed and scope for most, and unprecedented in recent history in the Asia. The financial crisis and China largely maintaining its reputation as an economic powerhouse throughout have further increased the attention of the Greater China region through the past year or so – with Taiwan's stock market being one of the strongest global winners all of this year 2009. Such increase in commercial activity directly between China, Hong Kong and Taiwan has swiftly and broadly raised concerns about mutual recognition and enforcement of arbitral awards – this article will provide an overview of the legal situation on this timely subject, with a focus on Taiwan law.

1. Foreign Arbitral Award – Definition, Recognition and Enforcement

As Taiwan is not a signatory to the New York Convention, the Arbitration Law of Republic of China ("Taiwan") governs the recognition and enforcement of foreign arbitral awards. A foreign arbitral award may be enforceable only after an application for recognition has been granted by the court.

However, when an application submitted by a party seeking recognition of a foreign arbitration decision, the application could be dismissed if such an award contains one of the following elements:

(1) Where the content of the arbitral award is contrary to the public order or good morals of Taiwan.

(2) Under the Taiwanese laws, the matter in dispute cannot be arbitrated or settled through arbitration.

(3) If the country where the arbitral award is made or whose laws govern the arbitral award does not recognize arbitral awards of Taiwan.

In addition, the respondent is also entitled to request the court to dismiss the application within twenty days from the date of receipt of the notice of the application if the counter-party applies to the court for recognition of a foreign arbitral award which concerns any of the following circumstances:

(1) The arbitration agreement is invalid as a result of the incapacity of a party according to the law chosen by the parties to govern the arbitration agreement.

(2) The arbitration agreement is null and void according to the law chosen to govern the arbitration agreement or, in the absence of choice of law, the law of the country where the arbitral award was made.

(3) A party is not given proper notice of the appointment of an arbitrator or of any other matter required in the arbitral proceedings, or any other situation which gives rise to a lack of due process.

(4) The arbitral award is not relevant to the subject matter of the dispute covered by the arbitral agreement or exceeds the scope of the arbitration agreement, unless the offending portion can be severed from and not affect the remainder of the arbitral award.

(5) The composition of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, in the absence of an arbitration agreement, the law of the place of the arbitration.

(6) The arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.

2. Arbitral Award Recognition and Enforcement between Mainland China, Hong Kong and Taiwan

The legal frameworks of Mainland China, Hong Kong and Taiwan's arbitration systems for the recognition and enforcement of foreign arbitral awards are either subject to, or modelled on, the New York Convention, but with minor different approaches to the implementation.

A. Between Taiwan and Mainland China:

An application may be filed with a court for a ruling to recognize an arbitral award, as well as a civil ruling or judgment, rendered in the Mainland China which is not contrary to the public order or good morals of Taiwan - a . An arbitral award from Mainland China may be enforceable after recognition has been granted by the court. The word ''may'' used above does not compel a court in Taiwan to immediately recognize a Mainland China award. Therefore, Taiwan's Arbitration Law will still be applicable. Once an application for the recognition of an award from Mainland China has been notified, the counter-party should still be able to request the Court to dismiss the application on the grounds listed in Article 50 of Taiwan's Arbitration Law.

However, according to the same act, an arbitral award rendered in Taiwan shall not apply in Mainland China until the time when the arbitral award is filed with a court in Mainland China for a ruling to recognize it or be enforceable in Mainland China. In 1998 the Supreme People's Court of Mainland China passed the "Regulation of Supreme People's Court Regarding People's Court Recognizing Civil Judgments of a Court of Taiwan" ("SPC Recognition Regulation") which came into effect on 16 May 1998. Since the passing of this Regulation, Taiwan restored its recognition of arbitral awards, as well as judgment decisions from Mainland China. In other words, both judicial bodies have recognized each other's judicial judgments and arbitration decision since 1998.

Although Article 19 of the SPC Recognition Regulation indeed extends the applicability of the Regulation to arbitral awards rendered in Taiwan, any application for the enforcement of a recognized Taiwan arbitral award must still be submitted before a competent intermediate court in accordance with the pertinent provisions of the Civil Procedure Law of Mainland China. At the same time, Article 4 of the SPC Recognition Regulation requires that the judgments of Taiwan courts ''shall not violate the one China principle'', and since the grounds of the mutual recognition and enforcement of arbitral award are based on unilateral legislation, it will still be influenced by cross-strait politics.

B. Between Taiwan and Hong Kong:

According to "Act Governing Relations with Hong Kong and Macau", "Article 30 through Article 34 of the Commercial Arbitration Act", instead of "Article 47 through Article 51 of the Arbitration Law", shall apply to the validity, a petition for court recognition, and suspension of execution proceedings in cases involving civil arbitral awards made in Hong Kong or Macau. However, since the Commercial Arbitration Act had been consolidated into the Arbitration Law, it is obvious that the Arbitration Law shall be applicable under this regulation.

Before 1997, Taiwan awards were summarily enforceable in Hong Kong. However, Mainland China resumed its sovereignty over Hong Kong on 1 July 1997 and resulted in a legal vacuum in enforcement of arbitral awards from Mainland China and Taiwan until further amendments to the Arbitration Ordinance of Hong Kong took effect in 2000 that substantially restored the status quo ante. Therefore, although the 1998 "Regulation of Supreme People's Court Regarding People's Court Recognizing Civil Judgments of a Court of Taiwan" is not applicable for Hong Kong, Taiwan awards may still be enforced under the ''universal'' enforcement provision contained in the modified Section 2GG (2) of the Arbitration Ordinance of Hong Kong.

Conclusion

As can be seen, there are strong legal grounds and historic precedent to ensure mutual enforcement and recognition for arbitral awards between China and Taiwan, but also Hong Kong. At the same time, the current political thawing seems to ensure that interference from political powers, still a specter in China, less in Taiwan, but at least a concern under the previous administration, is set to further diminish over time. Between China, Hong Kong and Taiwan, legal stability and facilitation of mutual recognition of arbitral awards does and will continue to go hand in hand with economic development and, thus, hopefully prosperity on all sides.

(This article is based on an excerpt of the Taiwan chapter of the "Asia Arbitration Guide" published by Dr. Andreas Respondek)

ASIA-PACIFIC: 19th AFIA Symposium | Sydney 7 August 2009

Lorraine Hui and Amanda Lees (Executive Committee)
Blake Dawson

On 7 August 2009, the University of Sydney hosted the 19th AFIA Symposium in its new state-of-the-art law building. We were privileged to have as our guest speaker Professor Taniguchi, Emeritus Professor at Kyoto University and former Chair of the WTO Appellate Body.

Members on the panels were A/ Professor Luke Nottage and A/ Professor Chester Brown from the University of Sydney, Kim Middleton and Damian Sturzaker from Marque Lawyers, and Georgia Quick and Amanda Lees from Blake Dawson.

The following topics were discussed during the Symposium:

1. Arbitration Agreement

The Singaporean Court of Appeal recently held in Insigma Technology Co Ltd v Alstom Technology Ltd that a mixed arbitration clause (arbitration before SIAC in accordance with ICC Rules) is valid and enforceable. Have courts in different jurisdictions dealt with a similar matter? What are the reasons behind drafting mixed arbitration clauses?

- Ad hoc LCIA arbitrations under the UNCITRAL Rules present no problems.
- Difficulties may arise where mixed arbitration clauses provide for the application of institutional rules, particularly in enforcement proceedings. For example, in the Singaporean case, SIAC would not really be applying the ICC Rules, since the ICC Rules provide for certain functions to be exercised by specific departments in the ICC.
- Mixed arbitration clauses are probably not advisable for practical reasons as they may not be enforced in some jurisdictions.

2. Seat of Arbitration.

Since the European Court of Justice's decision in West Tankers in February 2009, it is no longer possible to obtain an anti-suit injunction from a court in England (or any other EU member state) to restrain proceedings brought in breach of an arbitration agreement in another member state. Is London being chosen as an arbitral seat less often than before?

- England is the only common law jurisdiction in the EU where anti-suit injunctions may be obtained.